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Paper No. 38

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SEP 3 0 2003

**OFFICE OF PETITIONS
ON PETITION**

In re Application of
Richard Mettke
Application No. 09/134,831
Filed: August 17, 1998
Attorney Docket Number: 6388.005
Title of Invention: ON-LINE
COMMUNICATIONS
TERMINAL/APPARATUS

This is a decision on the petition filed August 18, 2003, under 37 CFR 1.137(a) to revive the above-identified reissue application.

The petition to revive under 37 CFR § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application became abandoned for failure to timely file a proper reply to a final Office Action pursuant to 37 CFR § 1.113. The final Office Action was mailed on March 12, 2002 and set a three (3) month shortened statutory period for reply. An amendment was submitted on April 24, 2002. In response to the amendment an Advisory Action was mailed on May 15, 2002 indicating the amendment submitted on April 24, 2002 did not place the application in condition for allowance. A second advisory action mailed June 25, 2002 informed petitioner the amendment of May 29, 2002 did not place the application in condition for allowance. A third advisory action was mailed on October 11, 2002 in response to the amendment submitted on September 16, 2002 informing petitioner the amendment did not place the application in condition for allowance.¹ A petition under 37 CFR 1.181 was dismissed on June 5, 2003. Accordingly, this application became abandoned on June 13, 2002. A Notice of Abandonment was mailed on June 9, 2003.

¹It is noted the amendment submitted on September 16, 2002 was untimely. Although petitioner submitted a 4 month request for extension of time along with the amendment, the maximum extendable period for reply expired on September 13, 2002.

PETITION TO REVIVE UNDER 37 CFR § 1.137(a)

a grantable petition under 37 CFR § 1.137(a) must be accompanied by:

- (1) the required reply,²
- (2) the petition fee,
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks items (1) and (3).

The instant petition lacks item (1) the required reply. The proposed reply required for consideration of a petition to revive after a final Office Action must be a Notice of Appeal (and appeal fee required by 37 CFR 1.17(b)), an amendment that prima facie places the application in condition for allowance, the filing of a continuing application or a Request for Continued Examination (RCE). See MPEP 711.03(c)(III)(A)(2) and 37 CFR 1.114.

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR §1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). a petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).³ Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, facsimile, or the negligence of otherwise reliable employees, the response is not timely received in the

² In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

³See MPEP 711(c)(III)(C)(2) for a discussion of the requirements for a showing of unavoidable delay.

Office.⁴

Petitioner's arguments have been considered but they are not persuasive. Petitioner asserts the application was unavoidably delayed because Examiner kept on responding to applicant's numerous amendments leading applicant to believe that a favorable action was pending. Furthermore applicant states he was unaware of the time constraints.

A review of the official record indicates petitioner submitted a total of three amendments in response to the Final Office Action. The Examiner in response to the amendments indicated applicant had failed to submit an amendment which would place the application in condition for allowance. Regardless as to whether petitioner anticipated a favorable response there is a limited time to provide a timely response. The final Office action and subsequent advisory amendments clearly informed petitioner there was a shortened 3 month period to reply to the Final Office Action. The actions further informed applicant the maximum extendable period for reply was six (6) months from the mailing of the Final Office Action. Thus petitioner's delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute an "unavoidable" delay.⁵

Thus, petitioner has failed to provide sufficient facts to warrant the finding of unavoidable delay within the meaning of 37 CFR 1.137(a).

The change of correspondence address submitted with the petition has been entered and made of record.

Alternative Venue

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). a grantable petition pursuant to 37 CFR § 1.137(b) must be accompanied by the required reply, the required petition fee, and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR § 1.137(b) was unintentional.

The filing of a petition under 37 CFR § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. a person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR § 1.137(b), was unintentional. a statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR § 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450

⁴Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

⁵See Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2D 1130, 1132 (N.D. Ind. 1987); Vincent v. Mossinghoff, 230 USPQ 621, 624 (D.D.C. 1985) Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130,131 (1891).


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Telephone inquiries should be directed to the undersigned at (703) 306-0251.



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